

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

GREGORY SHERF

APPELLANT,

**v.
CHRIS KOSTER, ET AL.**

RESPONDENTS.

DOCKET NUMBER WD73952

DATE: May 29, 2012

Appeal From:

Cole County Circuit Court
The Honorable Jon E. Beetem, Judge

Appellate Judges:

Special Division: James E. Welsh, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Attorneys:

Sophie Woodworth and David R. Smith, Kansas City, MO, for appellant.

Ronald R. Holliger, Jefferson City, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

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Before Special Division: James E. Welsh, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Gregory Sherf ("Sherf") filed suit against Charles Antoniak ("Antoniak") in the United States District Court ("federal court"). Antoniak, a uniformed Kansas City police officer, was working off duty as a security officer for Crowd Systems, Inc. when Antoniak arrested Gregory Sherf ("Sherf"). After Sherf was in custody, Antoniak assaulted him. Crowd Systems provided Antoniak with a defense and the case proceeded to trial. The federal court found that Antoniak ceased acting on behalf of Crowd Systems once he placed Sherf under arrest and because the assault occurred after the arrest, Antoniak was acting as a police officer when the assault occurred. The jury returned a verdict in the amount of \$7,278. Antoniak tendered a letter requesting defense pursuant to the State Legal Expense Fund ("the Fund") to the Police Board and shortly thereafter to the Attorney General. Those requests were denied. On March 17, 2009, the federal court entered final judgment in the amount of \$188,618.90 for attorneys' fees and expenses in addition to the damages found by the jury.

Sherf filed a Petition for a Declaratory Judgment asking that the sums owed to Sherf by Antoniak pursuant to the federal court final judgment be paid from the Fund. The circuit court granted the Fund's Motion for Summary Judgment.

Affirmed

Special Division holds:

The State Legal Expense Fund ("the Fund") is a statutory creation that provides for payment of claims against the State, any agency of the State, or any officer or employee of the State to the extent that the claim is not barred by the sovereign immunity doctrine. In 2005, the Missouri Supreme Court held that state Boards of Police Commissioners, like the one in Kansas City, were agencies of the state under the Fund's statutory scheme and, therefore, police officers working for the Board were therefore covered by the Fund. In response to the *Smith* decision, the State amended the statutes governing the Fund, effective on August 28, 2005. Among the 2005 amendments, the legislature eliminated Fund coverage for employees of police boards, such as Antoniak.

Sherf's claims arose on February 15, 2002 and were filed on April 18, 2003, before the amendments. The verdict was entered on February 26, 2008, after the effective date of the amendments. The determination of whether the Fund is applicable to Sherf's case is a matter of statutory interpretation.

The first issue is the application of the 2005 amendments on this cause of action. Substantive changes to a statute can only be applied prospectively, while procedural changes may be applied retrospectively under Article, 1 section 13 of the Missouri Constitution. To the extent that a 2005 amendment would eliminate Antoniak's claim from coverage by the Fund, the amendment is substantive and can only be applied prospectively.

The 2005 amendments did not eliminate coverage for employees of Police Boards who had claims pending. The Legislature provided that so long as the claims were promptly tendered to the Attorney General, that the Fund would fully cover those claims. Without such notice, the claims would not be covered by the Fund. In this case, the claim was not tendered to the Attorney General either promptly or prior to the statutory deadline. Antoniak did not tender his defense until after a verdict was returned against him and over three years after the statutory deadline. His claim is barred by the procedural 2005 amendments regarding notice and tender of a claim to the State.

Even assuming the pre-2005 statutory scheme applied to this case, before the amendments to the Fund the Eastern District of this Court held that notice to the State was required before coverage by the Fund could be enforced. The failure of a defendant to tender defense to the Attorney General and cooperate with the Attorney General in his defense prevents payment from the Fund under the statute. Point denied.

Per Curiam

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